Supreme Court
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In The
Supreme Court of the United States

October Term, 1999

KEVIN J. WILSON,
Petitioner

v.

AREA PLAN COMMISSION OF EVANSVILLE AND VANDERBURGH COUNTY AND CITY OF EVANSVILLE
Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE INDIANA COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI TO THE INDIANA COURT OF APPEALS

AND APPENDICES

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QUESTIONS PRESENTED

I.

DOES THE REQUIREMENT OF THE CITY OF EVANSVILLE ZONING CODE THAT A LANDOWNER OBTAIN A "SPECIAL USE PERMIT" PRIOR TO USING HIS OR HER PROPERTY FOR A CHURCH WHILE EXEMPTING IDENTICAL SECULAR USES CONSTITUTE AN INFRINGEMENT ON THE RIGHT TO FREEDOM OF RELIGION GUARANTEED BY THE FIRST AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES OF AMERICA?

II.

DOES THE BOARD OF ZONING APPEALS EVALUATION OF THE FACTORS SET FORTH IN THE ZONING ORDINANCE FOR GRANTING OR DENYING A SPECIAL USE PERMIT FOR A CHURCH USE CONSTITUTE AN EXCESSIVE ENTANGLEMENT OF GOVERNMENT IN RELIGION IN VIOLATION OF THE ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES?

III.

DOES THE DISCRETION ENJOYED BY THE BOARD OF ZONING APPEALS IN INDIANA IN APPROVING OR DENYING A SPECIAL USE PERMIT RENDER THE REQUIREMENT OF THE EVANSVILLE ZONING CODE THAT A LAND OWNER MAY OBTAIN A SPECIAL USE PERMIT PRIOR TO UTILIZING PROPERTY FOR CHURCH PURPOSES RENDER THAT PERMIT REQUIREMENT A PRIOR RESTRAINT?

IV.

DOES THE APPLICATION OF THE SPECIAL USE PERMIT REQUIREMENTS OF THE CITY OF EVANSVILLE'S ZONING CODE DIFFERENTLY WITH RESPECT TO DIFFERENT DOMINATIONS VIOLATES THE ESTABLISHMENT CLAUSE PURSUANT TO THIS COURT'S HOLDING IN THE CASE OF CHURCH OF THE LUKUMI BABALU AYE, INC. VS. THE CITY OF HIALEAH, 508 U.S. 520, 124 L Ed 2d 472, 113 S.Ct. 2217 (1993).

LIST OF PARTIES

The Petitioner before this court is Kevin J. Wilson. The Respondents before this court are the Area Plan Commission of Evansville, Vanderburgh County and the City of Evansville, Indiana.

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Petitioner respectfully prays that a writ of certiorari issue to review the opinion and judgment of the Indiana Court of Appeals.

OPINIONS AND ORDERS BELOW

The Opinion of the Indiana Court of Appeals is reported at 701 N.E.2d 856 (Ind.Ct.App. 1998) and is reproduced as Appendix ("Appx.") B. The order of the Indiana Supreme Court denying transfer is unreported and is reproduced as Appx A. The unpublished Findings of Fact and Conclusions of Law of the Vanderburgh County Superior Court for the State of Indiana is reproduced as Appx C.

JURISDICTION

The Indiana Court of Appeals entered its opinion on November 12, 1998. Petitioner then timely filed a Petition to Transfer to the Indiana Supreme Court which was denied on April 14, 1999. On July 2, 1999, Petitioner filed a timely Application for Extension of Time to File his Petition for Writ of Certiorari which was granted up to and including August 27, 1999. Petitioner has filed this Petition within the extension period. Therefore, this Court has jurisdiction pursuant to 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution.

1. AMENDMENT 1.

"Congress shall make no law respecting and establishment of religion, or prohibiting the free exercise thereof;...".

STATEMENT OF THE CASE

This Petition involves the use of Petitioner's (hereinafter Wilson) land for church purposes. Wilson has challenged the requirement of the City of Evansville's Zoning Code which required him to obtain a "special use" permit from an unelected administrative body, the Evansville Vanderburgh County Board of Zoning Appeals, prior to utilizing his property for religious worship. Wilson prevailed in the Trial Court and the Trial Court's decision was reversed by the Indiana Court of Appeals.

Wilson attacked the special use permit requirement on several grounds. Wilson alleged and continues to believe that the permit requirement constitutes an excessive burden on the free exercise of religion, that the permit requirement is not a valid and neutral law of general applicability, that the special use permit requirement operates as a prior restraint and promotes excessive entanglement between local government and religion. By classifying the special use permit requirement as a valid and neutral law of general applicability , the Indiana Court of Appeals rejected each and everyone of these arguments. The stipulated

facts found on Page 446 of the Record of Proceedings are as follows:

1. The duly enacted legislative body of the City of Evansville has enacted a special use ordinance, a true and accurate copy of which is attached thereto as Exhibit "A".

2. The Board of Zoning Appeals of Evansville and Vanderburgh County has promulgated rules and procedures for filing applications for special use permits. A true and accurate copy of the officially promulgated rules and procedures are attached thereto as Exhibit "B".

3. Plaintiff, Kevin J. Wilson, is the owner of real estate located a 3203 Kratzville Road, Evansville, Indiana (hereinafter "the Property"); the Property is zoned for commercial use and is located in a C-4 zoning district

4. On July 28, 1994, plaintiff made application with the Area Plan Commission of Evansville and Vanderburgh County (hereinafter "APC") to obtain a special use permit, Special Use Classification ! (SU-1), "Church and Church-Operated/Accessory Facility". A true and accurate copy of the Application submitted by plaintiff is attached thereto as Exhibit "C".

5. On September 15, 1994, the Board of Zoning Appeals of Evansville and Vanderburgh County (hereinafter

"BZA") at public hearing granted the special use permit requested by plaintiff. The special use permit was effective for a period of one year from the date of issuance. A true and accurate copy of the minutes of the aforementioned public hearing is attached thereto as Exhibit "D".

6. On August 3, 1995, a Staff Member of the APC notified plaintiff that the special use permit issued on September 15, 1994, would soon expire, and that he would have to make application for a new special use permit if he wished to continue operating a church on the property. A true and accurate copy of the notice sent is attached thereto as Exhibit "E".

7. The property is currently being used as a church, as defined by §15.153.08.134 of the Zoning Code of the City of Evansville.

8. The APC has instituted no administrative or legal proceeding to prevent Wilson from operating a church on the property.

9. Plaintiff has not appealed to the BZA any order or determination made by any administrative official or Staff Member of the APC, nor has he made application to obtain a new special use permit for the property.

10. Under the subject special use ordinance, "Churches and Church-Operated, Incidental/Accessory facility" are "special uses." Each special use classification may be approved upon a finding that the applicant satisfies the criteria specified in Zoning Code §15.153.08.132.

In addition, the Trial Court found that the respondents' definition of a church consisted of a Christian oriented institution (See Appx. C). This factual finding of the Trial Court was upheld by the Indiana Court of Appeals (see. 701 N.E.2d at 862).

B. Statement of Proceedings and Disposition in the Courts Below

On June 27, 1996, Wilson filed his complaint for Declaratory Judgment and for damages in the Vanderburgh County Indiana Superior Court. Wilson challenged the requirement pursuant to city ordinance that Wilson obtain a special use permit prior to utilizing his property for a religious worship. The parties made a factual stipulation on or about April 4, 1997 which is recited above. The trial of the matter was held on April 4, 1997 . On May 6, 1997, the Trial Court entered its Findings of Fact and Conclusions of Law and judgment in which Wilson prevailed and the special use permit requirement was declared unconstitutional, (Appx. C). On or about November 19,

1997, the respondent, City of Evansville filed its Praecipe to Appeal the Trial Court's judgment to the Indiana Court of Appeals. On December 30, 1997, the Record of Proceedings was filed in the Indiana Court of Appeals which rendered its opinion on November 12, 1998. The Indiana Court of Appeals reversed the Trail Court's ruling Wilson timely filed a Petition to transfer to the Indiana Supreme Court, which was denied on April 14, 1999.

REASONS FOR GRANTING THE WRIT

I.
CERTIORARI SHOULD BE GRANTED TO END A ZONING PRACTICE IN INDIANA WHICH CONSTITUTES A PRIOR RESTRAINT ON THE EXERCISE OF THE RIGHT TO THE FREE EXERCISE OF RELIGION AND PROMOTES EXCESSIVE ENTANGLEMENT OF GOVERNMENT IN RELIGION.

Evansville City Ordinance § 15.153.08.130 et.seq. requires a landowner to obtain a special use zoning permit, SU-2, to utilize his or her property as a church. In order to obtain such a special use permit he or she must make application to the Evansville Vanderburgh Board of Zoning Appeals. Evansville City Ordinance §15.153.08.132(B) 1-6 sets forth (6) criteria that the Board of Zoning Appeals (BZA) must consider for the approval of an application for a special use permit. Those criteria are:

> "(1) Whether the specific site is an appropriate location for the use.
>
> (2) Whether the use as developed will adversely affect the surrounding area.
>
> (3) Whether there will be nuisance or serious hazard to vehicle, pedestrians, or residents.
>
> (4) Whether adequate and appropriate facilities will be provided for proper operation of the use.
>
> (5) Whether the use is in harmony with the Evansville and Vanderburgh County Comprehensive Plan.
>
> (6) Whether the use is essential or desirable to the public convenience and welfare."

The Indiana Court of Appeals has recently, in interpreting a zoning ordinance with substantially similar criteria, held that the Board of Zoning Appeals has significant discretion in deciding whether to approve or deny a Special Use permit, *Crooked Creek Conservation and Gun Club v. Hamilton County North Board of Zoning Appeals*, 677 N.E.2d 544, 547-548 (Ind.Ct.App. 1997)(Reh'g.Den.)(Trans.Den.). The Indiana Court of Appeals stated:

> "However the *Town of Merrillville* case was careful to note that while some special exception ordinances are regulatory in nature and require an applicant to show compliance with certain regulatory requirements (e.g. structural specifications), providing the zoning board with no

> discretion, some special exception ordinances provide a zoning board with a discernable amount of discretion (e.g. those which require the applicant to show that its proposed use will not injure the public health, welfare or morals). *Id.* at 547, (citing *Town of Merrillville Board of Zoning Appeals v. Public Storage, Inc.* 568 N.E.2d 1092, 1095 (Ind.Ct.App. 1991)(n.3)(Trans.Den.)

The Court of Appeals then went on to hold that the BZA had a "significant amount" of discretion where the Hamilton County ordinance required the BZA to find the use "will not be injurious to the public health, safety, morals, or general welfare of the community" and "will not affect the use and value of other property in the immediate area in a substantially adverse manner;" This discretion derived from the fact that "these criteria, having no absolute objective standards against which they can be measured, involve discretionary decisionmaking on the part of the board." *Crooked Creek* at 548. In addition to the significant amount of discretion enjoyed by the BZA in deciding to approve or deny a special use for a church, the rejected applicant faces a difficult burden in overcoming the judicial presumption that the decision of the Board of Zoning Appeals is correct, *Ash v. County Board of Zoning Appeals*, 464 N.E.2d 347, 352 (Ind.Ct.App. 1984).

When one is dealing with whether to allow a recreational facility as in the *Crooked Creek* case, this discretion is not

problematic. Where a statute or ordinance gives administrative officials discretionary power to control in advance the rights of citizens to engage in constitutionally protected activities such as the free exercise of religion and the right to freely associate with others it will be held to be unconstitutional as a prior restraint on the exercise of such rights. *Kunz v. New York*, 340 U.S. 290, 293, 71 S.Ct. 312, 314, 95 L.Ed. 280, 284 (1951)(Police commissioner's authority to deny "for good reasons" permit for religious meeting held to be invalid prior restraint), *Nichols v. Planning and Zoning Commission of Town of Stratford*, 667 F.Supp. 72, 78 (D.Conn. 1987).

The criteria articulated under the Evansville ordinance is strikingly similar to the subjective criteria this court has held to be a prior restraint, *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150-151 & n.2, 89 S.Ct. 935, 938 & n.2, 22 L.Ed.2d 162, 167 (1969). It was an improper prior restraint for the city commissioner to be able to deny a parade permit because it would violate his idea of "public welfare, peace, safety, health, decency, good order, morals or convenience." *Id.* Under this court's prior decisions, the discretion enjoyed by the BZA in denying a special permit for church use of property is an unconstitutional prior

restraint. This court should grant certiorari to correct this prior restraint on the free exercise of religious rights.

The danger such discretion poses is that seeds could be planted for covert forms of discrimination based upon point of view, *Hefron v. International Society for Krishna Consciousness*, 452 U.S. 640, 649, 101 S.Ct. 2559, 2565, 69 L.Ed.2d 298, 307 (1981). As will be further addressed below, the Indiana Court of Appeals opinion sanctions interdemoninational discrimination and disparate treatment. The Court of Appeals' opinion is a sure formula for such discrimination. In Indiana, not only have the seeds of covert and not so covert discrimination based on viewpoint been planted, they've been fertilized watered and nurtured.

In addition, under the "*Lemon*" test, a law violates the establishment clause if it promotes excessive government entanglement in religion, *Tony and Susan Alamo Foundation v. Secretary of Labor*, 471 U.S. 290, 305, 105 S.Ct. 1953, 85 L.Ed.2d 278, 291 (1985). It would be more difficult to imagine how government can become more entangled in religion when it must decide whether the specific site is an appropriate location for the church, whether the church will adversely affect the surrounding area, whether the church will be nuisance or serious hazard to

vehicle, pedestrians, or residents, whether adequate and appropriate facilities will be provided for proper operation of the church, whether the use of the land for a church is in harmony with the Evansville and Vanderburgh County Comprehensive Plan. and whether the church is essential or desirable to the public convenience and welfare. If one substitutes the word "church" for the word "use" in the ordinance, the manifold constitutional infirmities in the SU-2 permit requirement become obvious.

II.
CERTIORARI SHOULD BE GRANTED BECAUSE THE INDIANA COURT OF APPEALS OPINION HAS LEGALIZED INTERDENOMINATIONAL DISCRIMINATION IN INDIANA

One portion of the Trial Court's ruling that the Indiana Court of Appeals did not reverse was the finding of fact that the BZA's operative definition of a "church" in applying the special use requirement was a christian oriented religious society, *Area Plan Commission of Evansville and Vanderburgh County v. Wilson*, 701 N.E.2d 856, 862 (Ind.Ct.App. 1998)(Trans.Den.) (see also Appx. C, finding of fact 5).

From an evidentiary standpoint, the Indiana Court of Appeals found itself constrained to reverse this finding of fact, *Wilson*, 701 N.E.2d at 862. It, however sought to diminish its significance in a courious manner. The Court of Appeals stated,

"Initially we must express our indredulity that the BZA would actually ascribe to such a narrow definition of the term." If BZA's interpretation of the ordinance were truly legitimate the there would have been nothing for the Court of Appeals to become incredulous about.

The Court of Appeals reasoned that, if the special use category SU-2 applies only to Christian places of worship then non-Christian places of worship are not a permitted use at all. Consequently, non-Christians such as Jews, Muslims and Hindus must get a variance for their place of worship, which is even more difficult. Therefore, the Court of Appeals reasoned, Wilson as a Christian was the beneficiary of the discrimination so such discrimination must be permissible, *Id.*

It is very significant that the Indiana Court of Appeals cited not one case from this court or any other Federal Court at any level in its analysis of this point. It would appear that this arises from the fact that it is logically impossible to reconcile the Court of Appeals' decision on this issue with the jurisprudence of this court. This court has clearly and unequivocally held that interdenominational discrimination is forbidden by the Establishment Clause of the First Amendment, *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532,

113 S.Ct. 2217, 2226, 124 L.Ed.2d 472 (1993). There is no support in the *Church of the Lukumi Babalu* case or any other cases from this court for the Indiana Court of Appeals resolution of this issue sanctioning interdenominational discrimination. This Court should grant certiorari to reaffirm that interdenominational discrimination is unconstitutional even in Indiana.

III.
CERTIORARI SHOULD BE GRANTED BECAUSE THE INDIANA COURT OF APPEALS HAS ERRONEOUSLY CHARACTERIZED THE REQUIREMENT THAT RELIGIOUS LAND USE OBTAIN A SPECIAL USE PERMIT WHILE EXEMPTING SIMILAR SECULAR LAND USES WHICH INVOLVE ASSEMBLY AS A NEUTRAL LAW OF GENERAL APPLICABILITY WHICH IS CONTRARY TO THIS COURT'S PRECEDENT

The The Court of Appeals' analysis is based upon its conclusion that the special use permit requirement for church use of land is a neutral law of general application. On page 860 of the opinion the Court of Appeals the Court of Appeals admits that it is relying primarily on the purposes of the ordinance as stated on its face rather than examining the effect of the ordinance. This approach exalts form over substance. When considering constitutional questions the court will look to the substance of the matter, nor merely the form, *Gasoline Products Co. Inc. v. Champlin Refining Co.* 283 U.S. 494, 498, 51 S.Ct. 513, 514, 75

L.Ed. 1188 (1931). Even if the ordinance were neutral on its face, facial neutrality is not determinative, *Church of Lukumi Babalou...*, 508 U.S. at 534, 113 S.Ct. at 2227, 124 L.Ed. 472. If the substance of the permit requirement is analyzed the flaws in the Court of Appeals analysis becomes readily apparent.

In the first instance, the interdenominational discrimination practiced by the BZA renders it an impossibility that the SU-2 permit requirement could be a neutral law of general applicability. Even if it ever was neutral and of general applicability, BZA has destroyed that characteristic by applying the requirement differently to different denominations.

The City of Evansville's zoning ordinance, like most, contains restrictions on the height of buildings, minimum lot size, setback, green space, lot coverage, minimum street frontage, parking and signage. § 15.153.10.156 of the ordinance requires all new and changed uses to submit a site plan and have it approved by a committee known as the "site review" committee which ensures compliance with these various requirements. Since all uses are subject to these requirements this portion of the zoning ordinance can fairly be said to be neutral and of general applicability. Wilson has no objection to religious uses being subject to the legitimate areas of regulation imposed on all uses.

Religious uses have an additional burden. A person seeking religious use of property must obtain a SU-2, special use permit prior to or incident to the site review process. This requirement is not neutral or of general application. Under the Evansville Zoning ordinance a particular group of people could congregate regularly for some secular purpose and generally not be required to obtain a special use permit. If one fact is changed wherein those same people are assembling for religious activities, they must obtain a SU-2 special use permit. It is conceptually difficult if not impossible to envision.

There is no basis for the Indiana Court of Appeals' reliance on the case of *Employment Division, Department of Human Resources v. Smith*, 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990). In *Smith* the aggrieved party sought an exemption from the drug/controlled substance laws for the religious use of Peyote, *Id.* Wilson is not seeking an exemption from the zoning ordinance but challenges only the additional requirement imposed on religious use of land which are not imposed on similar secular uses. In order to illustrate the distinction one might postulate slightly different facts wherein a religion engaged in the religious use of tobacco. Tobacco, like controlled substances, is highly regulated but it is legal for adults to use tobacco. Suppose a

statute were passed which requires a special permit for the religious use of tobacco while exempting secular use. The statute would not likely be upheld. Such a situation would be analogous to the case at bar and illustrates why the *Smith* case is not applicable.

In *Smith*, the prohibition on the use of peyote applied to all citizens of Oregon. If the statute singled out religious use and treated it more restrictively, then it would have been a much different case and likely have been decided differently. Unlike in *Smith*, the Evansville ordinance singles out religious uses of land and treats such uses differently by subjecting them to additional restrictions.

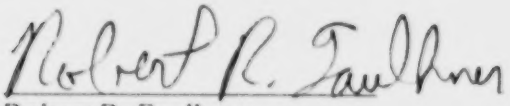
Since the law is not a neutral law of general applicability, it must be justified by a compelling governmt interest, *Smith*, 494 U.S. at 884-886, 110 S.Ct. at 1603-1604. The Court of Appeals, having errouneously classified the SU-2 permit requirement as a neutral law of general applicability, articulated no compelling governmental interest to justify it.

CONCLUSION

For the reasons set forth above and to ensure that the citizens of the State of Indiana enjoy the religious liberties enjoyed by all other citizens of these United States, Wilson respectfully

requests this Honorable Court grant this petition for a writ of certiorari.

Respectfully Submitted



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APPENDIX A

SUPREME COURT ORDER DENYING TRANSFER

(Indiana Supreme Court)

(Dated April 14,1 999)

(AREA PLAN COMMISSION OF EVANSVILLE, ET. AL., Defendants-Appellants, v. WILSON, KEVIN, Plaintiff-Appellee; No. 82A01-9712-CV-00429)

Before: Hon. Randall T. Shepard, Chief Justice

This matter comes before the Indiana supreme Court on a Petition to Transfer From a Decision of the Court of Appeals, Pursuant to Indiana Appellate Rule 11 (B). The Court has reviewed the decision of the Court of Appeals, the Record of Proceedings, the Briefs which were filed in the Court of Appeals, and the materials which were submitted in connection with the request to transfer jurisdiction. Each member of the Court has voted on the case. Each member of the Court has had the opportunity to voice that justices views on the Appeal in conference with the other justices.

Being duly advised, the Court now denies the Appellee's Petition to Transfer.

APPENDIX B

OPINION

(Reported at 701 N.E.2d 856)

(Court of Appeals of Indiana)

(Decided November 12, 1998)

(Area Plan Commission of Evansville and Vanderburgh County and the City of Evansville, Appellants-Defendants, vs. Kevin J. Wilson, Appellee-Plaintiff – No. 82A01-9712-CV-429; Appeal from the Vanderburgh Superior Court, No. 82DO3-9906-CP-1626; William J. Brune, Judge)

RATLIFF, Senior Judge.

STATEMENT OF THE CASE

Defendants-Appellants Area Plan Commission of Evansville and Vanderburgh County (the "Plan Commission") and the City of Evansville ("Evansville") appeal the trial court's judgment in favor of Plaintiff-Appellee Kevin J. Wilson ("Wilson").

We reverse and remand.

ISSUES

The Plan Commission raises four issues for our review, which we consolidate and restate as:

1. Whether the trial court erred in finding a portion of Evansville's Zoning Code is in violation of the free

exercise clause of the First Amendment to the United States Constitution.

2. Whether the trial court erred in finding that a portion of Evansville's Zoning Code is an unconstitutional prior restraint upon Wilson's exercise of religious speech.

3. Whether the trail court erred in finding that a portion of Evansville's Zoning Code is unconstitutionally discriminatory.

FACTS AND PROCEDURAL HISTORY

Wilson is the owner of Evansville property located in a district zoned for commercial use. On July 28, 1994, Wilson made application to the Evansville Board of Zoning Appeals (the "BZA") to obtain a special use permit to operate a church, consisting of believers of the Christian faith, on his Evansville property. On September 15, 1994, the BZA held a public hearing on Wilson's application for a special use permit and granted the permit for a period of one year from the date of its issuance. This one-year grant for a new applicant was standard practice and was normally followed by a more permanent grant upon a renewed application at the end of the first year.

On August 3, 1995, a Plan Commission staff member notified Wilson by letter that the special use permit would soon expire. Wilson elected not to file an application for a new permit. Instead, he filed a complaint for declaratory judgment alleging that

the portion of the Evansville Zoning Code requiring the permit (the "special use ordinance" or the "ordinance") was unconstitutional.

After a hearing, the trial court issued findings of fact, conclusion of law, and a judgment in Wilson's favor. The trial court concluded that the special use ordinance was unconstitutional. The Plan Commission and Evansville now appeal the trial court's judgment.

DISCUSSION AND DECISION

STANDARD OF REVIEW

Pursuant to the Uniform Declaratory Judgment Act, declaratory orders, judgments and decrees have the force and effect of final judgments and are reviewed as any other order, judgment or decree. *Indiana Farmers Mutual Insurance Co. v. Ellison*, 679 N.E.2d 1378, 1380 (Ind. Ct. App. 1997), *trans. denied*. The trial court entered findings of fact and conclusions of law when it rendered its judgment. When a party has requested specific findings of fact and conclusion of law pursuant to Ind. Trial Rule 52(A), the reviewing court may affirm the judgment on any legal theory supported by the findings. *Mitchell v. Mitchell*, 695 N.E.2d 920, 923 (Ind. 1998). In addition, before affirming on a legal theory supported by the findings but not espoused by the

trail court, the reviewing court should be confident that its affirmance is consistent with all of the trial court's findings of fact and inferences drawn from the findings. *Id.* In reviewing the judgment, we must first determine whether the evidence supports the findings and second, whether the findings support the judgment. *Ahuja v. Lynco Ltd. Medical Research*, 675 N.E.2d 704, 707 (Ind. Ct. App. 1996), *trans denied*. The judgment will be reversed only when clearly erroneous. *Id.* Findings of fact are clearly erroneous when the record lacks any evidence or reasonable inferences from the evidence to support them. *Id.* To determine whether the findings or judgment are clearly erroneous, we consider only the evidence favorable to the judgment and all reasonable inferences flowing therefrom, and we will not reweigh the evidence or assess witness credibility. *Id.*

Here, the trial court's declaratory judgment order was accompanied by findings of fact and conclusions of law which the trail court apparently made *sua sponte*[1]. The same standard of review applies when the trial court gratuitously enters findings of fact and conclusions of law, with one notable exception. *Indiana Farmers Mutual Insurance Co.*, 679 N.E.2d at 1381. When the

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[1] Neither party points to a particular request for specific findings or to a statute requiring specific findings.

trail court enters such findings on its own motion, the specific findings control only as to the issues they cover, while the general judgment standard applies to any issue upon which the court has not found. *Id.*

I. FREE EXERCISE

The First Amendment to the United States Constitution, which has been made applicable to the States by incorporation into the Fourteenth Amendment, provides in pertinent part that "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof...." Prior to 1990, the United States Supreme Court held that a government regulation of general applicability which significantly burdened religious beliefs or practices was in violation of the free exercise clause of the First Amendment unless the regulation was justified by a compelling state interest and was the lest restrictive means of achieving that interest. *See e.g., Sherbert v. Verner,* 374 U.S. 398, 83 S.Ct. 1790 (1963). In 1990, however, the strict scrutiny test requiring a compelling interest and least restrictive means was abandoned by the court in *Employment Division, Department of Human Resources v. Smith,* 494 U.S. 872, 110 S.Ct. 1595 (1990). In *Smith,* the court held that a government regulation which clearly furthers a secular public purpose does not violate the free exercise

clause, though the regulation as applied burdens a religious belief or practice, as long as the regulation is a "valid and neutral law of general applicability." 110 S.Ct. at 1600-01. In *Church of the Lukumi Babalu Aye, Inc. v. city of Hialeah*, 508 U.S. 520, 113 S.Ct. 2217 (1993), the court continued to adhere to the test announce in *Smith*. The court, however, did hold that a regulation burdening religious practice which is not neutral or of general application must advance compelling interests and be tailored narrowly in pursuit of these interests. 113 S.Ct. at 2233.

In the present case, the special use ordinance lists thirty-three "special uses," including colleges and universities; schools; churches and church-operated facilities; charitable and philanthropic institutions; public parks and recreational facilities; and stadiums, auditoriums, and arenas. *Zoning Code* §15.153.08.134. These special uses are designated as such because they "are necessary to the life and economic health of the community, but have characteristics of operation that do not readily permit classification in the usual residential, commercial, or industrial districts." *Zoning Code* §15.153.08.130. A property owner may utilize his property to exercise a special use in a traditional zoning district as long as the property owner secures a special use permit and the special use is permitted in that zoning

district. *Zoning Code* §15.153.08.136. A property owner wishing to utilize his property as a school or church is permitted to do so in any residential, commercial, or industrial zoning district. *Zoning Code*, Table S.U. at page 15-20. In order to obtain a special use permit, any property owner intending to utilize his property for any of the special uses must comply with the procedure set forth in the special use ordinance. *Zoning Code* §15.153.08.132.

The purpose of the special use ordinance, as stated on its face, is the accommodation of desirable land uses which cannot be subject to rigid and restrictive classification into the traditional residential, commercial, and industrial zoning districts. It is the legislative accommodation of special uses which necessitates an administrative review of an impact of the special use at a particular location within a given zoning district. Accordingly, "the requirement for a use permit is set out in the ordinance so that the body entrusted with the task of reviewing the application...can make certain that it would not adversely affect the public interest if placed in a particular location within the permitted zone." 3 Ziegler, Rathkopf's The Law of Zoning and Planning §41.01, p.4 (1981).

The inclusion of churches and church-operated facilities as special uses in the ordinance does not evince an intent to regulate

religious belief. Instead, such inclusion recognizes churches as one of many uses which do not fit easily into traditional zoning districts. The procedure set forth in the ordinance represents Evansville's determination to accommodate land use, and it applies to all special uses without regard to the religious or philosophical beliefs of the various landowners. Regulation of land use is a secular public purpose, and the special use ordinance carries out this purpose in a manner which is generally applicable to all special uses.

Wilson contends that the entire Evansville Zoning Code is not neutral because it requires churches and church-operated facilities to acquire a special use permit in a commercial district while authorizing similar uses, such as meeting halls, lodges, and union halls, to operate without acquiring a permit.[2] Wilson's contention is misplaced because the land uses referenced by Wilson may be both readily classified into particular traditional zoning districts and prohibited from existing other zoning districts. However, as noted above, special uses of land cannot be readily

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[2] Although only the special use ordinance was submitted as evidence at the hearing on this matter, both parties have referred to the applicable provisions of the complete Evansville Zoning Code. Because a copy of the entire Code is included in the record, we will address the issue of the neutrality of the entire code.

classified or restricted to certain zoning districts. Thus, special uses, such as schools and churches, are entitled to special consideration and are permitted in all traditional zoning districts even though they are not strictly compatible with the designated uses of that district. The regulation of land use under the Evansville Zoning Code is both generally applicable to special uses and neutral. Accordingly, the Code and the special use ordinance pass constitutional muster under *Smith*.[3]

After listing the various procedural provisions of the special use ordinance in its findings of fact, the trial court concluded that the procedures set forth in the ordinance for the acquisition of a special use permit constituted a substantial and unreasonable burden upon Wilson's free exercise of religion. Indiana courts have not specifically addressed the problem of how to determine whether the conditions imposed on the acquisition of

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[3] In *Attorney General v. Desilets*, 418 Mass. 316, 636 N.E.2d 233, 235 (1994), the Massachusetts Supreme Court recognized that the free exercise clause of the Massachusetts Constitution, though almost identical to the free exercise clause of the United States Constitution, could be interpreted to provide more protection of religion than afforded by the *Smith* decision. The court held that it prefer[red] to adhere to the standards of earlier First Amendment jurisprudence...." *Id.* at 236.

In this appeal, the parties do not raise the issue of whether the Evansville Zoning Code or the special use ordinance violate Article I, § 3 of the Indiana Constitution specifying that "[n]o law shall, in any case whatever, control the free exercise and enjoyment of religious opinions, or interfere with the rights of conscience." The issue is left for another day.

a special permit are too onerous. However, one authority has noted that conditions imposed on a special permit are proper "provided they do not, by the *cost, magnitude, or volume*, operate indirectly to exclude such uses together." 83AM.JUR.2d *Zoning and Planning* § 443 (1992) (citing *Cornell University v. Bagnardi*, 68N.Y.2d 583, 510 NYS2d 861) (emphasis supplied). We find this authority to be instructive.

The special use ordinance requires a landowner to (1) ascertain the names of the owners and tax codes of neighboring property; (2) pay an application fee; (3) file an application listing the owners and tax codes of the neighboring property; (4) supplement the application with a site plan showing the proposed use of the land, the location of buildings and structures, streets, access drives, off street parking, loading facilities, landscaping, green areas, and other specifications deemed necessary; (5) pay a legal ad fee for notification by newspaper; (6) mail notice via certified mail, return receipt requested to neighboring landowners; (7) submit a notarized affidavit regarding notice prior to the hearing; (8) attend the meeting at which the application is to be heard; and (9) obtain a vote of approval from a majority of the BZA members. The conditions require the expenditure of a reasonably small amount of time, effort, and money. Although the

conditions constitute a burden upon Wilson, they do not constitute an unreasonable burden. The conditions are not so onerous that they indirectly exclude the special use by their cost, magnitude, or volume.

II. PRIOR RESTRAINT

In his briefs directed to this court and the trial court, Wilson argued that the special use ordinance constitutes a prohibited prior restraint on religious speech under the reasoning of *Kunz v. New York*, 340 U.S. 290, 71 S.Ct. 312 (1951). In *Kunz*, the supreme court held that a city ordinance making it unlawful to hold public worship meetings on the streets without first obtaining a permit from a city official was invalid as a prior restraint on the exercise of the right of free speech. 240 U.S. 293, 71 S.Ct. at 314. The court reasoned that the ordinance improperly gave the city official discretionary power to control in advance the right of citizens to speak on religious matters on the streets of the city. *Id.*

The trial court applied *Kunz* to reach the conclusion that the special use ordinance is a prior restraint upon Wilson's right to engage in religious speech. The court based its conclusion on its determination that the criteria set forth in the ordinance for the approval of an application for a use permit are "sufficiently subjective that the [BZA] enjoys a wide degree of discretion in

whether or not to approve an application for a special use permit."[4] (R.393). The trial court further concluded that the BZA's discretion to use the criteria in refusing to grant a special permit, coupled with its discretion to place reasonable conditions upon the grant of a permit, was so "wide" as to constitute "an unconstitutional prior restraint on the free exercise of religion." (Conclusion of Law #6, R.394).

The special use ordinance is a neutral regulation of general applicability dealing with land use and determinations of the

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[4] The special use ordinance sets forth the following six criteria for the approval of an application for special use:

(1) Whether the specific site is an appropriate location for the use.

(2) Whether the use as developed will adversely affect the surrounding area.

(3) Whether there will be nuisance or serious hazard to vehicle, pedestrians, or residents.

(4) Whether adequate and appropriate facilities will be provided for proper operation of the use.

(5) Whether the use is in harmony with the Evansville and Vanderburgh County Comprehensive Plan.

(6) Whether the use is essential or desirable to the public convenience and welfare.

Zoning Code § 15.153.08.132(B).

impact of those uses upon public health, welfare, and safety. The ordinance understandably gives the BZA discretion to apply general criteria and conditions to the potential interference with public health, welfare, and safety occasioned by uses ranging from schools and churches to hospitals, crematoria, sanitary landfills, and livestock auction houses. The ordinance is intended to regulate the use of the land, not the speech of the owner of that land.

To the extent that the special use ordinance has an effect on Wilson's right to free speech, we find that it does not impermissibly imbue the BZA with unfettered discretion. The ordinance itself clearly indicates that discretion given to the BZA is to be used to help accommodate the special use. Furthermore, we have previously held that a zoning board's denial of a special permit will be subject to strict review. *See Board of Zoning Appeals v. Schulte*, 241 Ind. 339, 172 N.E.2d 39, 43 (1961) (holding that the adverse effect on property values is insufficient reason to deny a special permit to a church)' *Milharcic v. Metropolitan Board of Zoning Appeals of Marion County*, 489 N.E.2d 634, 637 (Ind. Ct. App. 1986) (holding that restrictions upon religious facilities are appropriate only where "the need or benefit which occasions the exercise of police power outweighs

the restriction on the rights of freedom of worship and assembly"); *Board of Zoning Appeals of Decatur v. Decatur, Indiana Company of Jehovah's Witnesses*, 233 Ind. 83, 117 N.E.2d 115, 120-21 (1954) (holding that lack of off-street parking was an insufficient reason to justify denial of a building permit to a church). Accordingly, the BZA's discretion to deny a special use to Wilson is severely limited.

III. DISCRIMINATION

The trail court found that Wilson was advised that the Plan Commission defined the term "church" as relating to a "Christian oriented institution." (Finding of Fact #5, R. 389-90). The trial court concluded that "the [Plan Commission's] operative definition of a church as a Christian oriented institution would by definition exempt other religions of a non-Christian nature from the requirement of obtaining a special use permit." (Conclusion of Law #11, R. 395). It further concluded that the "exemption of other non-Christian religions from the requirement to obtain a special use permit constitutes an impermissible discrimination against worshipers of the Christian faith and is thus unconstitutional." (Conclusion of Law #12, R. 395).

The trail court's finding is based upon the circled portion of a page copied from a legal dictionary and sent to Wilson by a

zoning enforcement officer in response to his inquiry about the definition of the term as used in the special use ordinance. the circled definition, which was sent prior to Wilson's 1994 application for special use, characterizes a church as "[i]n its most general sense, the religious society founded and established by Jesus Christ, to receive, preserve, and propagate his doctrines and ordinances." (R.443).

Initially, we must express our incredulity that the BZA would actually ascribe such a narrow definition to the term. However, given the evidence presented to the trial court, we cannot find that the trail court's findings of fact is clearly erroneous. However, we do find that the trial court's ultimate conclusion of law on this issue is clearly erroneous.

The Evansville Zoning Code permits specified uses in specific zoning districts. Absent a special use permit or grant of variance, all other uses in these districts are forbidden. If we accept the trial court's finding of fact, "Christian oriented" churches may operate in any district as a special use upon the grant of a special use permit. "Non-Christian" religious institutions, however, are neither specified uses nor special uses. Accordingly, the landowner wishing to use land as a "non-Christian" institution must secure the grant of a variance. The

grant of a variance is much more difficult to obtain than the grant of a special use permit. *See Boffo v. Boone County Board of Zoning Appeals*, 421 N.E.2d 2d 1119, 1124 (Ind. Ct. App. 1981) (quoting Rathkopf, §41.10, pp. 19-20 (1980)). Thus, landowners practicing "non-Christian" religions, not "Christian oriented" churches, would be discriminated against.[5]

CONCLUSION

The trial court erred in finding the special use ordinance unconstitutional.[6] Accordingly, we reverse and remand for entry of a declaratory judgment in favor of the Plan Commission and Evansville.

Reversed and remanded.

ROBB, J., AND FRIEDLANDER, J., concur

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[5] While we don't decide the issue, we note that a proper interpretation of "church" would encompass any organization for religious worship. We further note that it has been held that the term "church" as expressive of a place is not limited to the Christian religion." *State v. Vogenthaler*, 89 N.M. 150, 548 P.2d 112, 113 (1976).

[6] We note that Wilson attempts to raise in his appellee's brief the issue of whether the special use ordinance violates the establishment clause of the First Amendment. Wilson did not allege or argue this issue before the trial court, and the trial court did not find that the special use ordinance violated the establishment clause. Wilson's failure to raise the issue below results in waiver of the issue on appeal. *See R.R.S. II Enterprises, Inc. v. Regency Associates*, 646 N.E.2d 56, 59 (Ind. Ct. App. 1995), *reh'g denied, trans. denied.*

APPENDIX C

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

FINDINGS OF FACT

1. Plaintiff Kevin J. Wilson (hereinafter "Wilson") is the owner of real estate and improvements located at 3203 Kratzville Road, Evansville, Indiana (hereinafter "Subject Property").

2. At all times material herein, the City of Evansville had in force a special use ordinance, a copy of which is attached hereto as Exhibit A.

3. The Area Plan Commission of Evansville and Vanderburgh County is the administrative agency which is charged with the responsibility of enforcing said ordinance attached hereto as Exhibit A.

4. At all times material herein, the Subject Property has been and continues to be used as a church wherein various members of the Christian faith practice religion.

5. On or about June 3, 1994, the staff of the Area Plan Commission, in response to an inquiry by Wilson, advised Wilson that the definition used by the Area Plan Commission for a

church is that contained in Black's Law Dictionary which defines a church as a Christian oriented institution.

6. On July 28, 1994, Wilson applied to the Board of Zoning Appeals of the Area Plan Commission for a Special Use Permit SU-2 permit to operate a church on the subject property.

7. On September 15, 1994, the Board of Zoning Appeals granted Wilson an SU-2 Special Use Permit for a period of one (1) year.

8. When Wilson's permit expired on or about September 15, 1995, Wilson elected not to subject himself to the licensing scheme set forth in Exhibit A and initiated this action on June 27, 1996.

9. The Board of Zoning Appeals of the Area Plan Commission has promulgated and requires applicants for a special use to follow the rules of procedure attached hereto as Exhibit B in applying for and seeking a special use permit.

10. Prior to filing an application for a special use, the applicant must go to the Vanderburgh County Assessor's Office to review the plats kept therein and must obtain all the tax code numbers for all adjoining properties. The applicant must then go to the treasurer's office to find the owners of record who must be notified.

11. With regard to notification of adjoining property owners, the Board of Zoning Appeals requires strict compliance and the slightest discrepancy or deviation will be considered defective notice which may be grounds for a continuance or denial.

12. The applicant must file the list of abutting property owners, including mailing addresses and tax codes along with the application and filing fee.

13. To obtain a special use permit, the applicant must submit to the Area Plan Commission office an application which contains a site plan showing the proposed use of the land, the location and size of all buildings and structures, including signs, the location of streets, access drives and off street parking and loading facilities, buffer, landscaping and required green area and any other plans or specifications which the staff of the Area Plan Commission deems necessary.

14. The application must be filled out in triplicate and must be tendered along with an application fee.

15. The applicant must pay the legal ad fee for the newspaper advertisement prior to the meeting at which the application is to be heard.

16. After filing the application and prior to twelve (12) days before the Board of Zoning Appeals meeting, a notice must be mailed via certified mail, return receipt requested, to each of the abutting property owners listed on the application. This includes owners across streets, alleys, easements and cross-corner from the subject property as well.

17. The applicant must submit to the Area Plan Commission office by Noon the Wednesday before the Board of Zoning Appeals meeting a notarized affidavit along with one copy of the notice and the green receipts along with an explanation for any unreturned receipts.

18. The applicant and/or a representative must attend the Board of Zoning Appeals meeting at which the application is to be heard.

19. For the application to be approved, the applicant must get a vote of the majority of the members of the Board of Zoning Appeals. A majority of the members present will not suffice unless it constitutes a majority of the total membership of the Board of Zoning Appeals.

20. If the application for a special use is denied, then the applicant must wait a year to refile it unless the Board of Zoning Appeals votes unanimously to rehear it.

21. If there are insufficient votes to either approve or deny the special use, then it will continue to the next meeting and can, in principle, be continued indefinitely until a majority of the Board of Zoning Appeals votes to deny the special use or the majority votes to grant it.

22. Any Conclusion of Law set forth below which may be deemed a Finding of Fact is incorporated by reference herein as if fully set forth herein.

CONCLUSIONS OF LAW

1. Any Finding of Fact set forth above which may deemed a Conclusion of Law is incorporated by reference herein as if fully set forth herein.

2. The ordinance attached hereto as Exhibit A requires a property owner to obtain a license from an unelected administrative board prior to exercising his or her First Amendment rights to practice religion on his or her property.

3. Section 15.153.08.132(B) 1-6 sets forth (6) criteria for the approval of an application for special use. Those criteria are:

> "(1) Whether the specific site is an appropriate location for the use.
>
> (2) Whether the use as developed will adversely affect the surrounding area.

(3) Whether there will be nuisance or serious hazard to vehicle, pedestrians, or residents.

(4) Whether adequate and appropriate facilities will be provided for proper operation of the use.

(5) Whether the use is in harmony with the Evansville and Vanderburgh County Comprehensive Plan.

(6) Whether the use is essential or desirable to the public convenience and welfare."

This criteria is sufficiently subjective that the Board of Zoning Appeals enjoys a wide degree of discretion in whether or not to approve an application for a special use permit.

4. Section 15.153.08.132(C) grants the Board of Zoning Appeals discretion to impose, without limit, whatever conditions upon a special use permit the Board of Zoning Appeals deems "reasonable".

5. If an applicant is denied a special use permit and takes an appeal by Writ of Certiorari, the decision of the Board of Zoning Appeals denying the special use will be presumed correct and the applicant faces a substantial burden in overcoming that presumption.

6. The fact that an owner of property must obtain a permit prior to exercising First Amendment rights and the fact that

the Board of Zoning Appeals has wide discretion in its decision whether or not to approve a special use and in imposing any conditions, renders the ordinance attached hereto as Exhibit A an unconstitutional prior restraint on the free exercise of religion.

7. The steps set forth in the Findings of Fact above for a property owner to get a governmental license to utilize his or her property for the free exercise of religion constitute a substantial burden upon a person's free exercise of the freedom of religion guaranteed under the First Amendment of the Constitution of the United States and made applicable to the states by the Fourteenth Amendment to the Constitution of the United States.

8. The fact that the subject ordinance substantially burdens a citizen's free exercise of religion, places the burden of proof on the governmental defendants to show that the burden imposed by the ordinance is in furtherance of a compelling governmental interest and is the least restrictive means of furthering that compelling governmental interest.

9. Defendants Area Plan Commission and City of Evansville have not met their burden of demonstrating that the burden imposed by the ordinance is in furtherance of a compelling governmental interest and is the least restrictive means of furthering that compelling governmental interest.

10.

The fact that the ordinance requiring a special use permit for the operation of a church is a substantial burden upon the free exercise of religion and that said burden has been not been shown to be in furtherance of a compelling governmental interest nor the least restrictive means of furthering such an interest renders the requirement that a landowner get an SU-2 Special Use Permit to operate a church unconstitutional.

11. The staff of the Area Plan Commission, having communicated to Wilson the Area Plan Commission's operative definition of a church as a Christian oriented institution would by definition exempt other religions of a non-Christian nature from the requirement of obtaining a special use permit.

12. This exemption of other non-Christian religions from the requirement to obtain a special use permit constitutes an impermissible discrimination against worshipers of the Christian faith and thus is unconstitutional.

13. The law in Indiana is that churches may not be totally excluded from a residentially zoned area which is the most restrictive zoning.

14. The ordinance attached hereto as Exhibit A would give the Board of Zoning Appeals the ability to totally exclude a

church from a residentially zoned area by application of the criteria for the grant of a special use permit.

15. The fact that the criteria applicable to the grant of a special use permit can be utilized by the Board of Zoning Appeals to prevent religious uses in a residential area renders those criteria not applicable to religious uses.

16. By applying the ordinance attached hereto as Exhibit A and requiring Wilson to obtain a special use permit for religious use of his property, defendant Area Plan Commission has violated his First Amendment right to free exercise of religion as made applicable to the states under the Fourteenth Amendment to the Constitution of the United States.

17. By enactment of the unconstitutional requirement that Wilson obtain a government license prior to using his property for a religious use, the City of Evansville has violated Wilson's right to free exercise of religion as guaranteed by the First Amendment to the Constitution of the United States and as made applicable to the states by the Fourteenth Amendment.

18. At all times material herein, defendants Area Plan Commission and City of Evansville were acting under color of state law in violating Wilson's constitutional rights.

19. At all times material herein, defendants Area Plan Commission and City of Evansville were acting pu suant to and in furtherance of an unconstitutional policy, practice and custom which is to require worsnipers to obtain a governmental license prior to utilizing their property for the exercise of religion.

20. Pursuant to 42 U.S.C. § 1983, the City of Evansville and Area Plan Commission are liable to Wilson for damages in an amount to be determined in a subsequent hearing of this Court.

21. Pursuant to 42 U.S.C. § 1988, Wilson may recover a reasonable attorney fee incurred in prosecuting this matter in an amount to be determined in a subsequent hearing of this Court.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that pursuant to these Findings of Fact and Conclusions of Law set forth above, the Court enters judgment in favor of plaintiff Kevin J. Wilson and against defendants Area Plan Commission of Evansville and Vanderburgh County and the City of Evansville declaring that the ordinance requirement that a landowner obtain a special use permit to exercise freedom of religion on his or her property is unconstitutional.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that pursuant to 42 U.S.C. § 1983 defendants are liable

to Wilson for damages to be determined by subsequent hearing and pursuant to 42 U.S.C. § 1988, defendants are liable to Wilson for a reasonable attorney fee in an amount to be determined at the said hearing.

/s/
WILLIAM J. BRUNE, JUDGE,
VANDERBURGH SUPERIOR COURT